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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS-HQ-MB-2021-0105; FF09M22000-212-FXMB1232090000]

RIN 1018-BF71

Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking; notice of intent to prepare a National Environmental Policy Act document.

SUMMARY: To better protect migratory bird populations and provide more certainty for the regulated public, the Service seeks to address human-caused migratory bird mortality by codifying our interpretation that the Migratory Bird Treaty Act (MBTA) prohibits incidental take of migratory birds and developing regulations that authorize incidental take under prescribed

conditions. This document advises the public that the U.S. Fish and Wildlife Service (Service, we) intends to gather information necessary to develop a proposed rule to authorize the incidental taking or killing of migratory birds, including determining when, to what extent, and by what means it is consistent with the MBTA and compatible with the terms of the four migratory bird conventions. This information will be used to develop proposed regulations to authorize the incidental take of migratory birds under prescribed conditions and prepare a draft environmental review pursuant to the National Environmental Policy Act of 1969, as amended. We are furnishing this advance notice of proposed rulemaking and notice of intent to advise other agencies and the public of our intentions, obtain suggestions and information to include in the proposed rulemaking and environmental review, and announce public scoping webinars.

DATES: *Comment submission:* You may submit comments to help guide the development of the proposed rule and draft environmental review until [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Scoping meetings: We will hold six scoping meetings in webinar format: Three for federally recognized Native American Tribes and three for the general public. See *Scoping Meetings* below under **SUPPLEMENTARY INFORMATION** for details.

ADDRESSES: You may submit written comments by one of the following methods:

- Electronically at the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS–HQ–MB–2021–0105.

- By hard copy via U.S. mail: Public Comments Processing, Attn: FWS–HQ–MB–2021–0105; U.S. Fish and Wildlife Service; MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We will post all comments on <http://www.regulations.gov>, including any personal information you provide. See *Public Availability of Comments* below under **SUPPLEMENTARY INFORMATION** for further information.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director, Migratory Birds, U.S. Fish and Wildlife Service, at 202–208–1050.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service (Service) is the Federal agency delegated with the primary responsibility for managing migratory birds. Our authority derives from the Migratory Bird Treaty Act of 1918, as amended (MBTA; 16 U.S.C. 703 et seq.), which implements conventions with Canada, Mexico, Japan, and the Russian Federation. The MBTA protects certain migratory birds from take, except as permitted by the Service under the MBTA. We implement the provisions of the MBTA through regulations in parts 10, 13, 20, 21, and 22 of title 50 of the Code of Federal Regulations (CFR). Regulations pertaining to migratory bird permits are set forth at 50 CFR part 21.

The Service is charged with ensuring the conservation of migratory birds by the MBTA, consistent with its underlying conventions, and other relevant statutes. A primary example is the regulatory framework developed to manage hunting of waterfowl species in a manner that

ensures their long-term conservation. Early in the 20th century, habitat loss and hunting pressure resulted in declining populations for many waterfowl species. Through working closely with many partners, the Service successfully conserves and manages waterfowl populations and hunting continues to contribute to the U.S. economy.

The Service is concerned about the current status of migratory birds and publishes this advance notice of proposed rulemaking as an initial step in a process to achieve and manage the long-term conservation of migratory birds and provide regulatory certainty to the regulated community. Over the last 50 years, the total population of North American birds has declined by an estimated 3 billion birds (Rosenberg et al. 2019). Many of the 1,093 species of birds protected under the MBTA (50 CFR 10.13) are experiencing population declines due to increased threats across the landscape. Both natural and human-caused sources of bird mortality cumulatively contribute to declining bird populations. Millions of birds are directly killed by human-caused sources. These mortality impacts are exacerbated by lost or degraded habitat, ecological alterations resulting from changing climate, and natural causes of mortality. Many activities and projects that incidentally take migratory birds have voluntarily implemented beneficial practices (also referred to as best management practices, conservation measures, best practices, and mitigation measures) intended to avoid and minimize the take of migratory birds; however, many bird populations remain in decline. The Service is concerned that voluntary implementation of beneficial practices and prioritization of limited enforcement resources may be insufficient to conserve the species the Service is charged with protecting. The Service seeks to better protect migratory bird populations through addressing human-caused mortality with common-sense regulations that are not unduly burdensome.

The MBTA prohibits take, defined by regulation (50 CFR 10.12) to mean “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” Through this rulemaking process, the Service will clarify that incidental take is prohibited by the MBTA and codify that interpretation. On January 7, 2021, the Service published a final rule (86 FR 1134; hereafter “the January 7 rule”) defining the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. The January 7 rule defined the MBTA’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, to apply only to actions directed at migratory birds, their nests, or their eggs. Elsewhere in today’s *Federal Register*, we publish a final rule that revokes the January 7 rule, thus returning the Service to interpreting the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and longstanding agency practice prior to 2017. However, our revocation of the January 7 rule does not also include codification of our current interpretation of the MBTA as it applies to incidental take, it simply revokes the prior rule codifying our former interpretation and nothing more. With this advance notice of proposed rulemaking, the Service initiates the process to codify the interpretation that the MBTA prohibits incidental take and develop an approach to authorizing incidental take of migratory birds.

Purpose of This Document

The Service is publishing this advance notice of proposed rulemaking to gather information necessary to codify our interpretation of the MBTA as prohibiting incidental take and propose a system of regulations to authorize the incidental take of migratory birds under

prescribed conditions. As part of the development of these regulations, the Service is preparing a draft environmental review of this proposal pursuant to the National Environmental Policy Act.

The goal of this rulemaking is to provide regulatory clarification by codifying our interpretation of the MBTA as prohibiting incidental take, instead of relying on enforcement discretion, and to develop a common-sense approach for regulating incidental take to better protect migratory bird populations. Over the years and in recent rulemakings, the Service has received public comment and feedback from other Federal and State agencies and the public on regulating incidental take, the majority of which calls for the creation of a durable solution that effectively conserves migratory bird populations while providing regulatory clarification and certainty to the regulated community.

In an effort to provide both meaningful bird conservation and regulatory clarity and certainty through legal authorization to the regulated communities with whom we work, we are interested in comments regarding whether and how the Service could authorize incidental take and under what conditions or circumstances. For example, the Service is considering a system of regulations for authorizing incidental take. The Service is considering authorizing incidental take using three primary mechanisms: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain activity types; and (3) specific or individual permits. The Service is seeking public comment on the criteria the Service would use to apply these authorizations to various activities.

The Service is considering using regulatory authorizations to except certain activities from requiring a permit. For example, we are considering authorizing by exception and not requiring a permit for (a) noncommercial activities, including most activities by individuals (e.g.,

homeowner activities that take birds), and (b) certain activities where activity-specific beneficial practices or technologies sufficiently avoid and minimize incidental take.

A general permit could be authorized through a registration system. An entity would register, pay a required fee, and agree to abide by general permit conditions. These permit conditions may be activity-specific (i.e., certain industries would have their own specific general permit with conditions tailored to that industry) and require certain beneficial practices. The general permit would be effective upon submission of the request and would not require Service staff review prior to being effective. General permit conditions would not be customized to the applicant. The general permit would include reporting requirements. However, the Service would not need to specify a number of birds authorized, specify species of birds authorized, or require extensive monitoring requirements in the permit conditions for the registration system. For example, the Service could require permittees to report dead birds found during routine maintenance and operation activities rather than requiring an active monitoring program. The environmental review for general permits would be a collective review of the general permit system, not a separate review for each individual permit authorization. This means that we would review all of the data entered by general permittees as well as any monitoring data collected by the Service to assess the effects of the general permit program on migratory bird populations, instead of assessing those effects at the scale of an individual project.

For projects that do not meet the criteria for eligibility for a general permit, the Service is considering developing regulations describing eligibility criteria and procedures for applying for a specific permit to authorize incidental take of migratory birds similar to current specific permit regulations (50 CFR part 21, subpart C), where an application and required fee is submitted to Service staff. Subsequently, Service staff would review the application and develop

customized permit conditions. If such an approach is developed, the Service would seek to minimize the need for specific permits to the degree possible to reduce the administrative burden on the public, permittee, and Service. The Service would intend to reserve the use of specific permits to limited situations where case-by-case evaluation and customization is necessary and appropriate.

To apply the three-tiered approach being considered by the Service, we must identify criteria for when a given project qualifies as excepted from a permit, meets general permit requirements, or should apply for a specific permit. The Service is seeking input as to what those criteria should be. The Service does not intend to use the number of birds found dead on a given project site as a criterion. Instead, the Service seeks information on appropriate criteria, such as infrastructure design, beneficial practices, geographic features, and others. For example, there may be certain geographic areas which are known to have high volumes of migratory birds that might be specified for specific permits and might not qualify for general permits due to the high numbers of birds in those specific areas. Similarly, there may be infrastructure designs or technologies that effectively reduce incidental take, like the installation of flashing lights on communications towers, that could be an appropriate criterion for a permit exception or general permit.

In addition, the Service is interested in input regarding whether there are unique authorization types for government entities that the Service should consider, or whether government activities would be adequately covered by the authorization types described above. For example, the Service could consider excepting Federal agencies with a current, signed Memorandum of Understanding (MOU) with the Service for the conservation of migratory birds

from needing a permit for most activities. The Service does not intend to include military-readiness activities in this rulemaking, as those activities are already covered in 50 CFR 21.15.

The Service is also seeking input on what beneficial practices might be appropriate to require for different authorization types. Many activities and projects already voluntarily implement beneficial practices. (See table 2 in our final rule published elsewhere in today's *Federal Register*.) Our intent is to draw from these existing activity beneficial practices to establish regulatory requirements and permit conditions.

The Service seeks any information regarding the economic impacts (costs, savings, or neutral effects) associated with implementing activity-specific beneficial practices. This information will be used to help the Service to meet its requirements to evaluate the potential effects of the proposed and final rules on small businesses, small organizations, and small governmental jurisdictions.

The Service is considering developing individual, general-permit-authorization regulations for the following activities that have been identified as common sources of bird mortality and/or have well-developed, activity-specific beneficial practices:

- (a) communication towers,
- (b) electric transmission and distribution infrastructure,
- (c) onshore wind power generation facilities,
- (d) offshore wind power generation facilities,
- (e) solar power generation facilities,
- (f) methane and other gas burner pipes,
- (g) oil, gas, and wastewater disposal pits,
- (h) marine fishery bycatch,

- (i) transportation infrastructure construction and maintenance, and
- (j) government agency activities (excluding military-readiness activities already covered under 50 CFR 21.15).

For each of these activities, the Service is seeking information and data regarding the causes of migratory bird death and injury at projects, activity-specific beneficial practices, project-specific beneficial practices, economic costs and benefits of implementing beneficial practices for retrofitting existing infrastructure, and economic costs and benefits of implementing beneficial practices in new construction.

For activities not in the list above, the Service is seeking public input on how these activities should be treated (e.g., exception, general, or specific permit) and what beneficial practices should be required for these activities. The Service intends to update regulations to incorporate additional activity types based on updated information regarding effects to migratory birds. The Service is considering authorizing these activities through permit exceptions until activity-specific regulations are warranted and can be promulgated.

To improve the conservation of migratory bird populations and support efforts to ensure authorizing incidental take is consistent with the MBTA and compatible with the underlying migratory bird conventions, the Service is also considering implementing a conservation fee structure to fund programs to benefit birds. The Service seeks public input on whether it should consider a compensatory mitigation approach, where mitigation is developed and implemented specific to a given project or activity. Alternatively, the Service is considering a general conservation fee structure, where fees go to a specific, dedicated fund. The fund could be used for two primary purposes. First, the Service could use conservation fee funds to research and monitor human-caused mortality of birds to inform the implementation of the program. Research

and monitoring could be used to verify overall estimates of incidental take by project/activity type and the effectiveness of beneficial practices and conservation activities. Second, the Service could use conservation fee funds to address migratory bird population declines, including habitat loss and degradation and other sources of mortality. Because many migratory birds are in decline and in need of conservation action, a conservation fee requirement could help support efforts to ensure authorizing incidental take under these regulations is consistent with the MBTA and compatible with the four bilateral migratory bird conventions. The Service is seeking input on how a conservation fee could be structured and whether it is more appropriate than project/activity-specific compensatory mitigation.

Finally, the Service is expecting the need for regular review of permit conditions and regulations. New beneficial practices will be developed, and new technology may solve some situations as well as cause new problems. The Service is seeking input on the process for reviewing and updating requirements: How frequently should authorized activities be updated? How should additional activities be identified? How long should general permits and specific permits be authorized for? How should compliance with authorization conditions be documented and enforced?

Environmental Review

Public Scoping

A primary purpose of the NEPA scoping process is to receive suggestions and information on the scope of issues and alternatives to consider when drafting the necessary environmental documents and to identify significant issues and reasonable alternatives related to the Service's future proposed action. To ensure that we identify a range of issues and alternatives

related to the future proposal, we invite comments and suggestions from all interested parties.

We will conduct a review of the future proposed action according to the requirements of NEPA and its regulations, other relevant Federal laws, regulations, policies, and guidance, and our procedures for compliance with applicable regulations. Once the draft environmental documents are completed, we will offer further opportunities for public comment.

Proposed Action and Possible Alternatives

The Service is responsible for maintaining and restoring migratory bird populations for the American public, pursuant to the MBTA and four bilateral migratory bird conventions. Many projects implement voluntary, activity-based beneficial practices to avoid and minimize the incidental take of migratory birds. However, many migratory bird populations are significantly declining, and millions of birds are killed each year from human-caused sources of mortality contributing to these declines.

To better protect migratory bird populations and provide more certainty for the regulated public, the Service seeks to address human-caused mortality by developing incidental take regulations. The purpose of this action is to determine when, to what extent, and by what means it is compatible with the MBTA and the terms of the four migratory bird conventions to authorize the incidental taking or killing of protected migratory birds.

The Service is considering alternatives that apply a regulatory framework of authorizing incidental take through permit exceptions, general permits, and specific permits. The Service will evaluate how different criteria can be used to determine which authorization mechanism is appropriate for certain activities and what the requirements of that authorization should be (e.g., avoidance and minimization measures, required beneficial practices, etc.), including whether compensatory mitigation or a conservation fee or both should be required for general permits or

for specific permits. The proposed alternatives presented in the environmental analysis will be compared to the no-action alternative. The no-action alternative will compare estimated future conditions without implementation of the alternatives to the estimated future conditions with those alternative actions in place.

Requested Information

Issues Related to Development of Proposed Regulations

The Service is seeking data and information on the following:

(a) Human-caused migratory bird death and injury, in particular for the 10 activities listed above under the heading “**PURPOSE OF THIS DOCUMENT**”;

(b) beneficial practices to avoid and minimize migratory bird death and injury;

(c) activity-specific beneficial practices that should be considered as conditions of the authorization;

(d) criteria (such as infrastructure design, beneficial practices, geographic features, etc.) to qualify as excepted from a permit, for general permit registration, or to apply for a specific permit;

(e) economic costs and benefits of implementing beneficial practices that require retrofitting existing infrastructure;

(f) economic costs and benefits of implementing beneficial practices in new construction instead of current designs;

(g) economic costs and benefits of implementing beneficial practices that do not affect infrastructure;

(h) other economic information useful for setting required compensatory mitigation or a conservation fee;

(i) economic information on the benefits of migratory birds, such as ecosystem services, recreation, and other benefits; and

(j) any potential effects on small entities, such as small businesses, small non-profit organizations or small governmental entities with a population under 50,000.

Issues Related to the Scope of the NEPA Review

We seek comments or suggestions from the public, the regulated community, governmental agencies, Tribes, the scientific community, industry, or any other interested parties. Pursuant to NEPA, we will take into consideration all comments and any additional information received.

We are seeking comments on the identification of effects that might be caused by regulating incidental take of migratory birds. You may wish to consider the following issues when providing comments:

(a) Impacts on floodplains, wetlands, wild and scenic rivers, or ecologically sensitive areas;

(b) Impacts on park lands and cultural or historic resources;

(c) Impacts on human health and safety;

(d) Impacts on air, soil, and water;

(e) Impacts on prime agricultural lands;

(f) Impacts to other species of wildlife, including endangered or threatened species;

(g) Disproportionately high and adverse impacts on historically marginalized and or disadvantaged communities;

(h) Any other socioeconomic or other potential effects; and

(i) Any potential conflicts with other Federal, State, local, or Tribal environmental laws or requirements.

Scoping Meetings

The issuance of this document provides an opportunity for public involvement in the scoping process to guide the development of the proposed rule and environmental review. The public comment period begins with the publication of this document in the *Federal Register* and will continue through the date set forth above in **DATES**. We will consider all comments on the scope of the proposed rulemaking and draft environmental review that are received or postmarked by that date. Comments received or postmarked after that date will be considered to the extent practicable.

The Service will present information explaining this action in virtual scoping meetings during the public comment period. The purpose of scoping meetings is to provide the public with a general understanding of the background for this proposed rulemaking action, alternatives and activities it would cover, alternative proposals under consideration, and the Service's role and steps to be taken to develop the draft environmental documents for the proposed action. Additionally, the public comment period is to solicit suggestions and information on the scope of issues and alternatives for the Service to consider when preparing the draft environmental documents.

To help protect the public and limit the spread of the COVID-19 virus, the Service will hold virtual public scoping meetings to accommodate best practices and guidelines in place at the

time this document was prepared. The virtual public scoping meetings will provide the Service an opportunity to present information on the scope of issues and alternatives for which we are requesting comment. No opportunity for oral comments will be provided. Written comments may be submitted by the methods listed in **ADDRESSES**. We will hold the following scoping meetings in webinar format.

Meetings for federally recognized Native American Tribes:

- On October 26, 2021, from 12 p.m. to 1 p.m., Eastern Time.
- On October 28, 2021, from 3 p.m. to 5 p.m., Eastern Time.
- On November 2, 2021, from 1 p.m. to 3 p.m., Eastern Time.

Meetings for the general public:

- On November 4, 2021, from 12 p.m. to 1 p.m., Eastern Time.
- On November 8, 2021, from 3 p.m. to 5 p.m., Eastern Time.
- On November 10, 2021, from 1 p.m. to 3 p.m., Eastern Time.

Registration instructions and updated session information can be accessed on the Service Migratory Bird Treaty Act webpage at <https://www.fws.gov/regulations/mbta/>, or may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Scoping Webinar Accommodations

Please note that the Service will ensure that the public scoping webinars will be accessible to members of the public with disabilities.

Public Comments

To promulgate a proposed rule and prepare a draft environmental review pursuant to NEPA, we will take into consideration all comments and any additional information received.

Please note that submissions merely stating support for or opposition to the proposed action and alternatives under consideration, without providing supporting information, will be noted but not considered by the Service in the environmental analysis. Please consider the following when preparing your comments:

- (a) Be as succinct as possible.
- (b) Be specific. Comments supported by logic, rationale, and citations are more useful than opinions.
- (c) State suggestions and recommendations clearly with an expectation of what you would like the Service to do.
- (d) If you propose an additional alternative for consideration, please provide supporting rationale and why you believe it to be a reasonable alternative that would meet the purpose and need for our proposed action.
- (e) If you provide alternate interpretations of science, please support your analysis with appropriate citations.

The alternatives we develop will be analyzed in our draft environmental review pursuant to NEPA. We will give separate notice of the availability of the draft environmental review for public comment when it is completed. We may hold public hearings and informational sessions so that interested and affected people may comment and provide input into the final decision.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that the entire comment—including your personal identifying information—may be made publicly available at any time.

While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we use in preparing the environmental analysis, will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service Headquarters (see **ADDRESSES**, above).

Federally recognized Native American Tribes can request government-to-government consultation via letter submitted at any time during this rulemaking process.

Literature Cited

Rosenberg, K.V., A.M. Dokter, P.J. Blancher, J.R. Sauer, A.C. Smith, P.A. Smith, J.C. Stanton, A. Panjabi, L. Helft, M. Parr, P.P. Marra. Decline of the North American avifauna. *Science*. 04 OCT 2019: 120–124.

Authority

The authority for this action is the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703 *et seq.*) and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Shannon Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.